REMELY HUSSAIN

v.

PP

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[CRIMINAL APPEAL NO: 42A-2-04]
7 DECEMBER 2005

CRIMINAL LAW: *Penal Code - Section 165 - Motive - Whether a requirement or an essential ingredient for offence under s. 165*

CRIMINAL PROCEDURE: *Charge - Defective charge - Whether results in miscarriage of justice - Whether defect curable under s. 422 Criminal Procedure Code - Whether accused misled - Whether causing substantial prejudice*

CRIMINAL PROCEDURE: *Trial - Commencement - Whether accused to be tried by way of summons and not by an arrest case - Whether evidence remains admissible - Whether conviction illegal or unconstitutional*

CRIMINAL PROCEDURE: *Sentence - Factors to be considered - Whether accused can be treated leniently where there are exceptional and extenuating circumstances*

CRIMINAL PROCEDURE: *Security to keep the peace and for good behaviour - Bond under s. 173A Criminal Procedure Code - Whether s. 173A can be invoked where accused does not plead guilty*

The appellant (a technician at the Public Works Department Ipoh) was alleged to have obtained from a contractor, Ismail Bin Omar (PW6), a valuable thing being a Public Bank Berhad Cheque No: 015541 for the value of RM2,000 which was credited into the savings account of the appellant at Public Bank Berhad Ipoh for which the appellant gave no consideration. It was claimed that the appellant knew that PW6 had official dealings with the mechanical section of the Public Works Department where PW6 was awarded a project for which the appellant himself was the supervisor. The appellant was therefore charged with an offence punishable under s. 165 of the Penal Code. The appellant pleaded not guilty to the charge. At the close of the defence case, the learned Sessions Court judge found the appellant guilty, and so convicted and sentenced the appellant to fourteen (14) days imprisonment from the date of sentence and a fine of RM3,000 in default to two months imprisonment.

The appellant appealed against the conviction and sentence. The appellant's main complaint was that, the charge which was framed against the appellant was defective in that, it did not state whether the valuable thing was accepted for the appellant himself or for someone else. The evidence showed that the appellant had used the said cheque for RM2,000 and his own money to purchase a computer which was placed in the office of the mechanical department of the Public Works Department, Ipoh. It was also submitted that the offence under s. 165 of the Penal Code was a summons case, whereas the accused was arrested for an offence under the Anti Corruption Act 1997 but was charged with an offence under s. 165 of the Penal Code which is a summons case. This notwithstanding the case was registered as an arrest case and the trial was conducted as an arrest case. The trial was therefore illegal, and that being so he should be acquitted and discharged.

Held (setting aside the conviction and sentence):

[1] There was sufficient evidence adduced by the prosecution that the appellant had received the cheque for the sum of RM2,000 for himself at the material time when the same was credited into his personal bank account. The fact that the appellant had used the said sum of RM2,000 to subsequently purchase a computer which was placed in the office for the use of the staff of Public Works Department was a consideration towards mitigation and was not a defence to rebut the prosecution case or the offence under s. 165 of the Penal Code as motive for having accepted the said cheque of RM2,000 is not a requirement or an essential ingredient of the offence under s. 165 of the Penal Code. (p. 589 e-g)

[2] As to the charge, there was no miscarriage of justice or failure of justice and the omission in the charge as raised by the learned defence counsel namely, that it did not allege that he received the cheque for himself or for any other person for the value of RM2,000 did not affect the legality of the conviction and there was no reasonable possibility of prejudice to the appellant. In any case, it was curable under s. 422 of the Criminal Procedure Code. (p. 590 b)

[3] Mere omission or errors in the charge do not vitiate the conviction unless the appellant was misled or there was substantial prejudice to the appellant. The appellant had a fair trial with well established trial procedures and he was also represented by counsel of his choice and therefore he cannot be permitted to raise those complaints on the charge which he rightfully ought to have raised at the outset or during the trial. (p. 590 c, f)

[4] Although the appellant ought to have been tried by a summons case at the Sessions Court and not by an arrest case as registered in the instant case, the evidence remained admissible and it did not vitiate the trial proceedings and consequently, the conviction was not illegal or unconstitutional. (p. 593 f)

[5] As to what should be the appropriate sentence, it is important to consider the facts, the background, the extenuating or aggravating circumstances and other relevant consideration which would assist the court in deciding the appropriate sentence. When the balancing of the offence with the offender was considered on the facts and circumstances, it tilted in favour of the appellant that he be treated leniently on the exceptional and extenuating circumstances under which the offence was committed. (pp. 594 b & 598 e-f)

[6] Although the appellant had pleaded not guilty and contested the charge, that did not debar the court from invoking s. 173A of the Criminal Procedure Code if there were extenuating circumstances under which the offence was committed. The application of s. 173A of the Criminal Procedure Code need not necessarily be invoked only to offenders who had pleaded guilty at the beginning of the trial. (p. 600 a-c)

[7] On a proper balance of all the relevant circumstances, the punishment which would meet justice of the case in the instant case, was to release the appellant on a bond under s. 173A of the Criminal Procedure Code. (p. 602 f)

[8] If a sentence is excessive or inadequate to such an extent as to satisfy an appellate court that when it was passed there was a failure to apply the right principles, then intervention by the court is justified. (p. 661 c)

Case(s) referred to:
Abu Bakar Alif v. R [1953] 19 MLJ 19 ***(refd)***
Ahmad Hj Bakar v. PP [1988] 2 MLJ 216 ***(refd)***
Balakrishnan v. DPP [1969] 2 MLJ 61 ***(refd)***
Billinghurst & Ors v. King Emperor Air [1924] Cal 18 ***(refd)***
Chan Sit Hoong v. PP [1975] 1 MLJ 261 ***(refd)***
Chittanranjan Das v. State Of West Bengal Air [1963] SC 1696 ***(refd)***
Chow Kim Lan v. PP [1966] 1 MLJ 183 ***(refd)***
Damodaran v. The State Of Travancore – Cochin Air [1953] SC 462 ***(refd)***
Garmaz Pakhar v. PP [1995] 3 SLR 701 ***(refd)***
Goh Hock Huat v. PP [1995] 1 SLR 274 ***(refd)***
Karuma v. R [1955] AC 197 ***(refd)***
Lew Cheok Hin v. Reg [1956] 22 MLJ 131 ***(refd)***
Lim Poh Tee v. PP [2001] 1 SLR 674 ***(refd)***
Low Seng Wah v. PP [1962] 28 MLJ 107 ***(refd)***

Mahfuz Ali v. State Air [1953] Allahabad 110 [vol. 40 Cn 46] ***(refd)***
Makkhan & Ors v. Emperor Air (32) [1945] Allahabad 81 ***(refd)***
Mat v. PP [1963] 29 MLJ 263 ***(refd)***
Moh Yee Chong (F) & Anor v. PP [1955] 21 MLJ 115 ***(refd)***
PP v. Ahmad Shafie [1988] 1 CLJ 36; [1988] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Chan Akau [2000] 4 MLJ 471 ***(refd)***
PP v. Fam Kim Hock [1957] 23 MLJ 20 ***(refd)***
PP v. Govindnan Chinden Nair [1998] 2 CLJ 370 HC ***(refd)***
PP v. Idris [1955] 21 MLJ 234 ***(refd)***
PP v. Ishak Hj Shaari & Ors Appeals [2003] 3 CLJ 843 FC ***(refd)***
PP v. Ismail Loyok [1958] 24 MLJ 223 ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. James Tan [1983] 2 MLJ 173 ***(refd)***
PP v. Liew Choo Kwong & Ors [1962] 28 MLJ 382 ***(refd)***
PP v. Lim Guan Hock [1949] 15 MLJ 231 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mohamad Ramly [1974] 1 MLJ 95 ***(refd)***
PP v. Mohamed Fathi Hj Ahmad [1974] 2 MLJ 75 ***(refd)***
PP v. Onn [1969] 1 MLJ 4 ***(refd)***
PP v. Perumal Suppiah [2000] 3 SLR 308 ***(refd)***
PP v. Tan Eng Hock [1970] 2 MLJ 15 ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(refd)***
PP v. Tengku Mahmood Iskandar [1973] 1 MLJ 128 ***(refd)***
PP v. Vijaya Raj [1981] 1 MLJ 43 ***(refd)***
PP v. Yeong Yin Choy [1976] 2 MLJ 267 ***(refd)***
PP v. Yong Thiam Fatt [1980] 2 MLJ 145 ***(refd)***
R v. Kane [1974] VR 759 ***(refd)***
R v. Osenkowski [1982] 30 Sasr 212 5 A Crim R 394 ***(refd)***
R v. Sang [1980] Ac 402 ***(refd)***
R v. Sargeant [1974] 60 Cr APP R 74 ***(refd)***
Re Badri Abas [1971] 1 MLJ 202 ***(refd)***
Re Eng Chong Lam [1964] 30 MLJ 10 ***(refd)***
Rex v. Leo De Cruz [1935] MLJ 1 ***(refd)***
Rex v. Teo Cheng Lian [1949] 15 MLJ 170 ***(refd)***
Rs Nayak v. Ar Antulay & Anor Air [1986] SC 2045 ***(refd)***
Shanmuganathan v. PP [1967] 1 MLJ 204 ***(refd)***
State Of Madras v. A Vaidyanatha Iyer Air [1958] SC 61 ***(refd)***
Taib Gemok v. PP [1984] 1 MLJ 313 ***(refd)***
Tan Teck Seng v. PP [1990] 2 CLJ 103 HC ***(refd)***
Tan Teck Yam v. PP [1968] 1 MLJ 57 ***(refd)***
Tia Ah Leng v. PP [2004] 4 CLJ 77 CA ***(refd)***
Tilley [1991] 53 A Crim R 1 ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Varatharajalu v. PP [1960] 26 MLJ 158 ***(refd)***
Wong Siak Fon v. PP [1972] 1 MLJ 203 ***(refd)***
Zulkiflee Mohd Dom v. PP [1997] 4 CLJ Supp 290 HC ***(refd)***

Legislation referred to:
Anti Corruption Act 1997, ss. 30, 47(1)
Criminal Procedure Code, ss. 154, 156, 173A, (2), (g), 294A, 422
Penal Code, s. 165

For the prosecution - Kevin Morais (Nazlyza Mohamad Nazrai with him), DPPs
For the appellant - Mohamad Asri Othman; M/s Asri, Chek Ming & Co

Reported by Amutha Suppayah

JUDGMENT

VT Singham J:
In this appeal, the appellant was charged at the Sessions Court, Ipoh on 25 April 2003 as follows:

> Bahawa kamu pada 5 Februari 2002, di Public Bank Berhad, Jalan Dato' Maharaja Lela, di dalam Daerah Kinta, di dalam Negeri Perak, sebagai Penjawat Awam, iaitu, Juruteknik yang bertugas di Jabatan Kerjaraya Cawangan Mekanikal, Ipoh, Perak, menerima suatu benda berharga dengan tiada balasan, iaitu, sekeping cek Public Bank Berhad No. 015541 bertarikh 5 Februari 2002 yang bernilai RM2,000 melalui akaun simpanan kamu di Public Bank Berhad Ipoh, No. Akaun 4164110729, daripada seorang kontraktor Ismail bin Omar, yang kamu ketahui mempunyai urusan rasmi yang telah dijalankan dengan Jabatan Kerjaraya Cawangan Mekanikal iaitu, kontraktor ini telah diberikan kerja untuk melaksanakan suatu projek 'Pakej Ransangan Baru', di mana kamu juga sebagai Juruteknik yang menyelia projek berkenaan dan dengan demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 165 Kanun Kesiksaan.

The appellant pleaded not guilty to the charge. At the close of the prosecution case, the learned Sessions Court Judge found that the prosecution had established a *prima facie* case against the appellant and ordered the appellant to enter to his defence on the said charge on 10 December 2003. The appellant elected to testify on oath and called one witness (DW2) to support his defence. At the close of the defence case, the learned Sessions Court Judge found the appellant guilty, convicted and sentenced the appellant to (14) days imprisonment from the date of sentence on 10 March 2004 and fined RM3,000 in default two months imprisonment on the said charge, an offence under s. 165 of the Penal Code. Hence, this appeal by the appellant against the conviction and sentence which was filed on 11 March 2004. The learned Deputy Public Prosecutor had also filed a notice of cross appeal against the sentence on 17 March 2004.

In the Sessions Court, the prosecution called seven witnesses to support the charge. The prosecution's case briefly is that: (i) the appellant who was a public servant at the material time (a technician at the Public Works

Department Ipoh) had obtained from a contractor, En. Ismail Bin Omar (PW6), a valuable thing being a Public Bank Berhad Cheque No: 015541 dated 5 February 2002 for the value of RM2,000 which was credited into the savings account of the appellant at Public Bank Berhad Ipoh account No: 4164110729 for which the appellant gave no consideration for it. (ii) The appellant knew that the contractor (PW6) had official dealings with the mechanical section of the Public Works Department where the contractor (PW6) was given contract works to carry out a project (Pakej Rancangan Baru) where the appellant himself as a technician was supervising the said project. Based on this facts, the prosecution/respondent had contended that the charge against the appellant has been proved *prima facie* at the close of the prosecution case and that at the close of the defence case, the prosecution had established its case beyond reasonable doubt against the appellant.

It is important to state at this stage that the prosecution evidence in support of the charge is supported by documentary evidence namely, Public Bank Berhad cheque No: 015541 dated 5 February 2002 for an amount of RM2,000 (exh. P5) issued in favour of the appellant by Huge Engineering Ipoh in which the contractor (PW6) was the Managing Director, payment baucher No: 0014 dated 5 February 2002 (exh. P6) prepared by Huge Engineering Ipoh and approved by the contractor (PW6), the payment slip which shows that the said cheque for the sum of RM2,000 was credited into the Public Bank account of the appellant on 5 February 2002 (exh. P8 and P8a), the service record of the appellant (exh. P9), the Borang Inden Kerja prepared by the appellant in favour of the contractors, Huge Engineering Ipoh (exh. P10a-e), payment voucher by the Director of Public Works Department Perak dated 31 December 2001 in favour of Huge Engineering Ipoh (exhibit P11a) and the Affin Bank Ipoh Garden Branch Ipoh cheque for the sum of RM18,800 and other payment vouchers and cheques which was issued by the Director of Public Works Department Perak in favour of Huge Engineering Ipoh (P11a - P11e), letter dated 30 May 2003 from Pejabat Jurutera Mekanikal Negeri, JKR Cawangan Kejuruteraan Mekanikal Negeri Perak Ipoh addressed to Anti Corruption Agency Perak, Ipoh in respect of the position held by the appellant pursuant to s. 47(1) of the Anti Corruption Act 1997 and the duties of the appellant (exh. P12).

On the other hand, the appellant's main complaint *inter alia* is that, the charge which was framed against the appellant is defective in that, it did not state whether the valuable thing was accepted for the appellant himself or for someone else, which according to the appellant's counsel En. Mohd Asri b. Othman is an important ingredient of the offence under s. 165 of the Penal Code. The appellant through cross-examination of the prosecution witnesses at the trial had disclosed that the said sum of RM2,000 which was received

by him was infact used to pay for a computer which cost RM4,399 from I.T. Castle Sdn Bhd which is supported by a Sales Order Form dated 5 February 2002 (exh. D15).

Charge

As to the ingredient which was required to be included in the charge, it cannot be disputed that the charge must state whether the public servant, in the instant case, the appellant had received the cheque for the sum of RM2,000 for himself or for someone else which certainly was omitted in the charge. Nevertheless, this court had observed that there was no dispute, first, the appellant was a public servant, secondly, he had accepted the said cheque for the value of RM2,000 which was paid into the appellant's bank account, thirdly, the appellant gave no consideration for the said cheque for the value of RM2,000 and fourthly, the appellant knew that (PW6) who was a contractor had connection or dealings with the mechanical section of the Public Works Department under the project "Pakej Rancangan Baru" in which the appellant as a technician was supervising the said project. However, this omission was not raised on behalf of the appellant at the outset of the trial or even during the trial which rightfully ought to have been done but with respect, it was not raised and this was graciously and with his usual candidness, conceded by learned counsel for the appellant but it was only brought as a ground of complaint during the submissions at the close of the prosecution case. However, had this objection been raised at the outset of the trial or during the trial, the prosecution could have applied to amend the charge to include the particular ingredient as required by s. 165 of the Penal Code or the court itself may have granted a discharge not amounting to an acquittal under s. 173(g) of the Criminal Procedure Code on the ground that the charge was groundless.

On the other hand, learned deputy public prosecutor, Mr. Kevin Morais submitted as follows:

(1) he conceded that there was omission in the charge to include the said ingredient whether the said cheque for the sum of RM2,000 was accepted for the appellant himself or someone else but however submitted that the evidence produced during the prosecution case had subsequently rectified this omission that the said cheque for the sum of RM2,000 was received for someone else and that it was for the purchase of the computer and confirmed by the evidence of PW6. In support, the learned Deputy Public Prosecutor referred to the case of *Zulkiflee Bin Mohd Dom v. Public Prosecutor* [1997] 3 CLJ Supp 290 HC;

(2) the appellant was not prejudiced as there is evidence that the appellant had received the said cheque for a value of RM2,000 without consideration and that PW6 had a working relationship with the appellant. He reiterated that there was a working relationship between PW6 and the appellant;

(3) Government officers are not to receive gifts without valuable consideration from persons who have official dealings and that is the spirit of s. 165 of the Penal Code;

(4) that the omission to include the said ingredient in the charge was curable under s. 422 of the Criminal Procedure Code. The learned Deputy Public Prosecutor relied on the following cases:

(i) *Zulkiflee Dom v. Public Prosecutor* [1997] 3 CLJ Supp 290 HC

(ii) *Garmaz S/O Pakhar v. Public Prosecutor* [1995] 3 S.L.R. 701

(iii) *Goh Hock Huat v. Public Prosecutor* [1995] 1 S.L.R. 274

(iv) *Lew Cheok Hin v. Reg* [1956] 22 MLJ 131

(v) *Public Prosecutor v. James Tan* [1983] 2 MLJ 173

However, learned counsel for the appellant urged this court to consider that if the court were to find that the omission of the ingredient in the charge was curable, the said sum of RM2,000 was used to purchase the computer and that the appellant had paid a further sum of RM2,399 out of his pocket and that the computer was placed in the office of the mechanical department of the Public Works Department and used by the staff with the knowledge of the head of the department and that this was a relevant piece of evidence for the court to consider the defence which had raised doubt on the prosecution case.

The learned Deputy Public Prosecutor on the other hand, immediately responded and submitted that it was more of a mitigating factor rather than a defence. In any event, the learned Deputy Public Prosecutor conceded that the RM2,000 was paid towards the purchase of the computer and further conceded that it was given for the benefit of others and other persons included the staff of the Public Works Department. Nevertheless, the learned Deputy Public Prosecutor quickly took a stand and submitted that this factor was not relevant or essential ingredient of the offence under s. 165 of the Penal Code as motive or intention of having accepted the cheque for the sum of RM2,000 was not an essential requirement of the said offence. Learned counsel for the appellant

further submitted that someone else must be a person and not the department and that that omission has prejudiced the defence and therefore the charge is illegal and that on this score alone, the conviction ought to be quashed.

Before going into the merits of the appeal, it is important to deal with the first complaint, that the charge is defective and as a result it had prejudiced the appellant and therefore the appellant ought to have been acquitted and discharged at the close of the prosecution case on the offence under s. 165 of the Penal Code. Section 165 of the Penal Code states as follows:

> Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant.
>
> Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted, by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

It cannot be denied that an accused person should not be put in peril on an ambiguity in the charge which is framed against him. However, no defect or error is a material one if it does not produce injustice or there is a miscarriage of justice and is generally curable pursuant to s. 422 of the Criminal Procedure Code. Section 422 of the Criminal Procedure Code states:

> Irregularities not to vitiate proceedings.
>
> Subject to the provisions contained in this chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

The whole complaint on the issue that the charge is defective turns, first, whether the charge which is an offence under s. 165 of the Penal Code must specify the missing ingredient being, that the valuable thing, in the instant case, the said cheque for the sum of RM2,000 was received for the appellant himself or for someone, in the instant case, for the department. This court is of the view that there is no doubt that this particular ingredient is an essential ingredient of the offence under s. 165 of the Penal Code. Secondly, whether the charge has notified the accused fairly what offence he has committed so that he can adequately prepare his defence and thirdly, whether the omission has prejudiced the appellant and has occasioned a miscarriage of justice and vitiated the trial. As stated above, this court is of the view that the words for himself or for any other person is an essential ingredient of the offence under s. 165 of the Penal Code which for the purpose of clarity is important to refer to the said provision and which states as follows:

> Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant.
>
> Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted, by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment for a terms which may extend to two years, or with fine, or with both.

As to whether the charge has notified the appellant fairly of what offence he has committed, it depends on the facts and circumstances of each case and the stand taken on behalf of an accused person at the outset of the trial or during the trial. In the instant case, learned counsel for the appellant has which this court had observed earlier with his usual candidness conceded that no objection was taken at the outset or even during the course of the trial that the accused did not know what was the charge against him. Therefore, the accused cannot presently plead ignorance that he did not know what offence he had committed as the proper time to have raised this objection was when the charge was read to him and his plea was taken or during the trial and not at the close of the prosecution case which submission is usually made with the view to persuade the court not to order the accused to enter his defence on the ground that the prosecution had failed to establish a *prima facie* case. Nevertheless, it cannot be denied that the defence is at liberty to raise this

complaint that the charge is defective at the close of the prosecution case but what effect or result it will have in favour of an accused person is all depended on the facts and circumstances of each case.

Section 154 of the Criminal Procedure Code states as follows:

> When manner of committing offence must be stated.
>
> When the nature of the case is such that the particulars mentioned in s. 153 and 154 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

Section 156 of the Criminal Procedure Code states as follows:

> Effect of errors.
>
> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission.

Be that as it may, since the appellant who was represented by counsel had proceeded to cross-examine the prosecution's witnesses, he cannot now complain that he was misled or prejudiced and that the omission of the material ingredient had occasioned a miscarriage of justice as he must have been aware of the charge against him for his counsel to cross-examine the prosecution witnesses, put questions to them and disclosed his line of defence. (See *Public Prosecutor v. Mohamed Fathi Bin Haji Ahmad* [1974] 2 MLJ 75). Infact, from the questions put to the prosecution witnesses it is clear that the appellant was attempting to show that the said cheque for the sum of RM2,000 was received not for himself but for someone and in this case, he had used the said money for the purchase of the computer which was placed in the office of the mechanical department of the Public Works Department, Ipoh. The question of whether the error, or omission in the charge has or has not occasioned a failure of justice is a question of fact and it will all depend on the facts and circumstances of each case as observed earlier by this court. (See *Makkhan & Others v. Emperor AIR* (32) [1945] Allahabad 81).

In *Mahfuz Ali v. State AIR* [1953] Allahabad 110 [Vol. 40, C.N. 46], Mukerji J. said:

> The first point which was raised was that the charge which was framed was defective in as much as it did not indicate the manner in which the accused had abused his position in order to have pecuniary advantage by illegal and corrupt means. It was further said that the illegal and corrupt means employed was also not indicated in the charge. In my opinion the inclusion of all these matters in

> the charge may have and possibly would have, made the charge better but their absence from the charge did not amount to anything more than a petty irregularity which could be cured, specially, when I find that by this no prejudice has been caused to the accused. (See *Low Seng Wah v. Public Prosecutor* [1962] 28 MLJ 107, *Billinghurst & Ors v. King Emperor A.I.R* 1924 Cal 18 and *Damodaran v. The State of Travancore - Cochin A.I.R*. [1953] S.C. 462).

On the other hand, it cannot be disputed that the whole object of framing a charge is to enable the accused to focus on the case that he has to meet and if the charge is framed with a missing ingredient of the offence then it could arguably be said that the charge is defective. In *Low Seng Wah v. Public Prosecutor* [1962] 28 MLJ 107 at p. 109, Neal J has made the following observations:

> I have made reference to the question of whether or not the accused in the court below has been misled by the omission of an essential ingredient. Section 156 of the Criminal Procedure Code which again is in mandatory terms reads: "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission." It will be noted so far as this appeal is concerned that reference is made to an error in stating the offence and further an omission to state the offence. Illustration (a) further clarifies the meaning of s. 156 if any clarification be required, and makes it clear to me that the omission of an essential ingredient in the charge upon which an accused has been convicted after full trial would not in view of s. 321 of the Criminal Procedure Code entitle me to set aside the conviction unless the accused has been misled. It seems to me, therefore, that to succeed on this appeal the appellant must establish two things. Firstly, that an essential ingredient of the offence was omitted from the charge and secondly, he was misled by that omission.
>
> I am forced to the conclusion that even if the omission of one or other of these phrases was the omission of an essential ingredient of the charge the appellant was not misled, and if the charge can be said to have been bad for duplicity there has been no miscarriage of justice. I have said if the charge can be said to be bad for duplicity because in my opinion reading the charge as a whole and in particular the details it is made clear that the prosecution's allegation is that it was an inducement and not a reward. To me an inducement is something that leads one to do something and a reward is a return or recompense for something done.
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> As to the second ground of appeal argued before me, on a perusal of the evidence I am satisfied that there was ample evidence, if the prosecution case was believed, that the acceptance of the sum of RM30 was for showing favour in relation to the appellant's principal's affairs. As for the averment that there was no evidence that it was received as a reward, that is to say, as a payment for something already done as opposed to an inducement to do something in future, it is clear in my opinion from the charge that the allegation is not that

the money was received as a reward but that it was received as an inducement, and this allegation if the prosecution evidence is accepted is clearly established by the evidence.

In *Zulkiflee Mohd Dom v. Public Prosecutor* [1997] 3 CLJ Supp 290 HC, His Lordship Augustine Paul JC (now judge of the Federal Court) had observed the effect of a failure to particularise the ingredient in the charge, and His Lordship referred to the case in *Wong Siak Fon v. Public Prosecutor* [1972] 1 MLJ 203 at p. 205 where His Lordship Lee Hun Hoe J. (as he then was) *inter alia* said:

> The charge must be so framed to enable an accused person to know with certainty what case he has to meet. I also referred to *Liew Min Poh v. PP* [1962] 3 MC 316 where Azmi J (as he then was) held that in a charge under s. 420 of the Penal Code it was necessary to set out not only the fact that the appellant had obtained goods by dishonest means but also the deceptions which had been practiced for otherwise the charge was illegal amounting to a nullity.

The language of ss. 154 and 156 of the CPC may appear to be in conflict with each other. So would the illustrations to both the sections appear to be. I shall attempt to show that they are not. It is a fundamental rule of statutory interpretation that all sections in a statute must, as far as possible, be given a meaning. The provisions of an Act must be construed in a way '… that produces the greatest harmony and the least inconsistency' (see *Australian Alliance Assurance Co Ltd v. Attorney General (Qld)* [1916] St R Qd 135). As Pearce and Geddes said in their book entitled *Statutory Interpretation in Australia* (4th Ed) at p. 110:

> The overriding idea is that an Act should be read as a whole and this has the effect of making all provisions subject to one another.

The cases that I cited earlier on the need to particularise the deception practiced did not consider the effect of s. 156 of the CPC except for the case of *Liew Min Poh v. PP* [1962] 3 MC 316 where Azmi J (as he then was) having referred to that section and its illustration (b) preferred to follow *Tan Peng Ann v. PP* [1949] MLJ Supp 10 where s. 156 of the CPC was not argued. In my opinion an analytical reading of both the sections reveal that they are in harmony with each other. They have their own separate and distinct roles to play in the CPC and, as a matter of fact, complement each other and are not in conflict. Section 154 is a general provision while s. 156 serves to qualify it. Section 154 will render a charge defective if an objection to its non-compliance is taken before the commencement of the trial while s. 156 will not invalidate such a charge if the objection is taken during or at the conclusion of the trial in the circumstances mentioned in the section. This becomes apparent when it is realised that the object of s. 154 is, firstly, to ensure that the accused has sufficient notice of the matter with which he is charged as otherwise he will be seriously prejudiced in his defence and, secondly, to enable the court to keep in view the real points in

issue and to confine the evidence to such matters. This as of necessity means, in the light of the explicit provisions of s. 156, that the requirement of s. 154 arise for consideration before the commencement of the trial with appropriate amendments, if necessary. In this regard I refer to *PP v. Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 63 where Mohamed Azmi J (as he then was) in commenting on this section said at p 66:

> *… the charge must give such particulars as are necessary to enable the accused to prepare his defence or give proper instructions to his counsel before trial. (Emphasis added).*

On the other hand the words in s. 156 '... at any stage of the case ...' And '... unless the accused was in fact misled by such error or omission ...' show that this section is activated after the commencement of the trial. This is obvious as the question of the accused being misled or not will only arise at this stage. The section states in unmistakable terms that if the accused has not been misled such error or omission to state the offence or the particulars required shall not be regarded as material. The fact that the accused has not been misled despite the defect in the charge amounts to the objects of s. 154 being satisfied. It follows that the object of s. 156 is to ensure that technical defects in the charge should not be allowed to defeat the ends of justice. In considering the application and object of this section the 2 AIR Commentaries on The Code of Criminal Procedure [1973] says at pp. 594-594:

> It is for the court to decide in each case whether the defect in a charge has misled the accused. The question of prejudice to the accused is ultimately one of inference from all the facts and circumstances of the case. The court will be slow to entertain the question of prejudice when the details are not furnished. In considering the question of whether the accused has been prejudiced in his defence by the defect in the charge, regard must be had to the fact that the objection to the frame of the charge was not raised till a late stage of the proceedings.

The section is aimed, among other things, at objections on the ground of variance between the charge and the evidence. But the fundamental principle in all criminal charges is that the accused should not be prejudiced in his defence and, therefore, where a charge expressed in vague terms has been understood in a certain sense and proceedings have gone on on such basis, it is not thereafter open to the prosecution to contend that the charge means something else. The object of the section is that technical defects in the charge should not be allowed to defeat the ends of justice.

The corollary is that a conviction cannot be set aside unless the accused has been misled by the omission of an essential ingredient in the charge as the section is in mandatory terms (see *Low Seng Wah v. PP* [1962] MLJ 107). The burden is on the accused to establish that he was misled by the error or omission. As Neal J said in *Low Seng Wah v. PP* [1962] MLJ 107 in considering s. 156 of the Code, at p 109:

> It appears to me, therefore, that to succeed on this appeal the appellant must established two things. Firstly, that an essential ingredient of the offence was omitted from the charge and secondly, he was misled by that omission.

On the application of s. 156 to a charge for cheating I refer to the Indian Supreme Court case of *Damodaran v. The State of Travancore-Cochin AIR* [1953] SC 462 where the charges under s. 420 of the PC as framed were vague in that they did not specify the manner and mode in which the cheating had been done. The court held that the defect in the charges amounted to an irregularity which had not materially prejudiced the accused. Similarly in *Billinghurst & Ors v. King Emperor AIR* [1924] Cal 18 it was held at p. 41, that the omission to specify certain particulars in a charge for cheating:

> … should not be regarded as a fatal defect in the charge, inasmuch as the accused were not misled and there was no failure of justice by reason of the omission of the abovenamed particulars from the charge.

In this appeal there was nothing to suggest that the accused had been misled. No objection had been taken to the defect in the charge by the accused either at the commencement or in the course of the trial. On the contrary his case falls squarely within the parameters of illustration (b) of s. 156 of the CPC. Though the particulars of the deception have not been set out in the charge the accused defended himself and gave his own account of the transaction. There was clear evidence that he claimed to be a police officer and that he could settle the khalwat offence in respect of which the complainant was caught. The complainant was carefully cross-examined on these issues by learned counsel for the defence and it cannot be said that the accused was prejudiced by the defect in the charge. In the circumstances the omission to set out the particulars of the deception in the charge cannot be said to be material to warrant a ruling that the charge is defective. I pause to add that defects in the charge as in the appeal before me ought to have been rectified by the trial court (see *Lew Cheok Hin v. R* [1956] MLJ 131).

In *Chittanranjan Das v. State Of West Bengal AIR* [1963] SC 1696, Gajendragudkar J in delivering the judgment of the Supreme Court said:

> Requirements of procedure are generally intended to subserve the ends of justice, and so, undue emphasis on mere technicalities in respect of matters which are not of vital or important significance in a criminal trial, may sometimes frustrate the ends of justice. Where the provisions prescribed by the law of procedure are intended to be mandatory, the Legislature indicates its intention in that behalf clearly and contravention of such mandatory provisions may introduce a serious infirmity in the proceedings themselves; but where the provisions made by the law of procedure are not of vital importance, but are, nevertheless, intended to be observed, their breach may not necessarily vitiate the trial unless it is shown that the contravention in question has caused prejudice to the accused.

In the circumstances and on the set of the facts in the instant case, this court is of the view that even though the material ingredient was omitted from the charge namely, the words for himself or for any other person, it did not vitiate the entire trial or had occasioned a miscarriage of justice or misled the appellant. The only question that is to be considered on the said issue is, whether the appellant has been prejudiced by the omission, whether he was taken by surprise and whether prejudice was occasioned by such surprise. On the set of facts and the circumstances in the instant case and the fact that the objection was not raised at the outset or during the trial, it is clear that the appellant was not taken by surprise or he was prejudiced as he was able to cross-examine the prosecution witnesses, put questions and propose his line of defence and he was able to reply intelligently in his defence. In any event on the set of facts and the circumstances in the instant case, the failure to include the said ingredient in the charge had not occasioned any prejudice or a reasonable probability of prejudice but was an irregularity or omission which was curable under s. 422 of the Criminal Procedure Code. Accordingly, it is not sufficient to warrant the quashing of the conviction.

There is another complaint by learned counsel for the appellant that there was an error in the procedure carried out in the proceedings that the offence under s. 165 of the Penal Code was a summons case as provided under the first schedule of the Criminal Procedure Code, whereas the case is registered as an Arrest case and drew a distinction between a seizable offence under s. 30 of the Anti Corruption Act 1997 and the powers of investigation on non-seizable offence. Therefore, learned counsel submitted that there was discrimination against the appellant as had the trial proceeded as a summons case, his client would not have been made to sit in the Dock and in the instant case, the appellant was to his prejudice made to sit in the Dock because the charge was registered as an arrest case. Learned counsel also submitted that the Criminal Procedure Code is a general law whereas the Anti Corruption Act 1997 is a specific law and the specific law must state which particular provision it has been taken out of the Criminal Procedure Code and urged upon this court to allow the appeal. On this score, learned counsel submitted that the entire trial proceedings was illegal and the conviction ought to be quashed.

In reply, the learned Deputy Public Prosecutor conceded that s. 165 of the Penal Code is a summons case and that s. 165 is a prescribed offence and that s. 30 of the Anti Corruption Act 1997 is a seizable offence and all prescribed offences are seizable. He further submitted that (i) specific legislation has its own intention and not within the Criminal Procedure Code as being a summons case. (ii) There is no error in the trial proceedings as intended by the legislature, the Anti Corruption Act 1997 which was a later provision must have been aware of the provisions in the Criminal Procedure Code.

As to the defence case, the learned Deputy Public Prosecutor submitted that the story given by the appellant at the defence case was not a defence as such and there is no requirement of motive as raised on behalf of the appellant. The learned Deputy Public Prosecutor further submitted that motive is immaterial and referred to Ratanlal Law of Crimes where it states that motive or reward is wholly immaterial and the acceptance of a valuable thing without consideration or with inadequate consideration from a person who has or is likely to have any business to be transacted, is forbidden because though not taken as a motive or reward for showing any official favour, it is likely to influence the public servant to show official favour to the person giving such valuable thing.

On the other hand, learned counsel submitted that the defence raised was not considered by the learned Sessions Court Judge and there was no *mens rea* and s. 165 of the Penal Code is not a strict liability offence and urged upon this court to acquit and discharge the appellant.

Decision

On going through the Record of Appeal which contains the evidence of both the prosecution and the defence, the relevant documentary evidence, both the written and oral submissions made on behalf of the appellant and the respondent and considering the authorities tendered by both parties and the authorities obtained upon research by this court, the decision of this court is as follows:

(i) there is sufficient evidence adduced by the prosecution that the appellant had received the cheque for the sum of RM2,000 for himself at the material time when the same was credited into his personal bank account;

(ii) the fact that the appellant had used the said sum of RM2,000 to subsequently purchase a computer which was placed in the office for the use of the staff of Public Works Department is a consideration towards mitigation and is not a defence to rebut the prosecution case or the offence under s. 165 of the Penal Code as motive for having accepted the said cheque of RM2,000 is not a requirement or an essential ingredient of the offence under s. 165 of the Penal Code. In *RS Nayak v. AR. Antulay & Anor AIR* [1986] S.C. 2045, R.N. Misra J. said "the question of motive or reward is wholly immaterial and the acceptance of a valuable thing without consideration or with inadequate consideration from a person who has or is likely to have any business to be transacted, is forbidden because though not taken as motive or reward for showing any official favour, it is likely to influence the public servant to show official favour to the person giving such valuable thing. Section 165 of the IPC is intended to keep

the public servant free from corruption and thus ultimately ensure purity in public life." (See *State Of Madras v. A. Vaidyanatha Iyer AIR* [1958] S.C. 61).

As to the charge, there was no miscarriage of justice or failure of justice and the omission in the charge as raised by the learned defence counsel namely, that it did not contain that he received the cheque for himself or for any other person for the value of RM2,000 did not affect the legality of the conviction and no reasonable possibility of prejudice to the appellant for the reasons stated above and on the facts and circumstances in the instant case, it was curable under s. 422 of the Criminal Procedure Code. This court is of the view that mere omission or errors in the charge did not vitiate the conviction unless the appellant was misled or there was substantial prejudice to the appellant. In addition to administering justice fairly and impartially to the appellant, the trial must not be frustrated by technicality so long as mere omission or errors did not vitiate the conviction unless the appellant was substantially prejudiced where this complaint was disregarded or rejected by the court when it was raised at the outset or during trial which was not the position in the instant case. This court is mindful and has considered that it is not the function of the court or an accused to perfect the charge for the prosecution and that this case must be distinguished in a situation where no objection had been raised to the admission of an inadmissible evidence, the trial judge was nevertheless under a duty to prevent it from being adduced for inadmissible evidence does not become admissible by reason of failure to object and in the instant case, the trial court should not be blamed for not perfecting the charge.

In the instant case, as this court had said above, this court wishes to reiterate that the appellant had a fair trial with well established trial procedures and he was also represented by counsel of his choice and therefore he cannot presently be permitted to raise those complaints on the charge which he rightfully ought to have raised at the outset or during the trial except that it was submitted at the close of the prosecution case at the Sessions Court. If this was done perhaps the charge could have been perfected and may have made a difference to the decision at the conclusion of the trial. The appellant cannot deny that he did not know the charge that the cheque for the value of RM2,000 was infact accepted by him for himself at the time when the cheque was credited into his personal account and subsequently, he made part payment by using this money to purchase the computer. In any event, the motive of accepting the said cheque for the value of RM2,000 is irrelevant to the offence under s. 165 of the Penal Code as submitted by the learned Deputy Public Prosecutor. Infact, judging from the whole of the evidence and cross-examination by the defence so glaringly showed that the appellant was aware right from the beginning of the trial that the accusation was against him and

that he received the said cheque which was credited into his bank account. Infact the line of cross-examination of the prosecution witnesses, the submissions made on behalf of the appellant at the close of the prosecution case supports that this is not a case where the appellant was misled, prejudiced by the charge to such an extent that it had occasioned a miscarriage or failure of justice. Therefore, this court is satisfied that the appellant was able to appreciate the charge and adequately and sufficiently defend himself through his counsel against the charge as was framed against him and that it did not possibly cause any prejudice or injustice whatsoever to the accused. Further, it was not fatal to the trial. (See *Moh Yee Chong (F) & Anor v. Public Prosecutor* [1955] 21 MLJ 115, *Public Prosecutor v. Ahmad Shafie* [1988] 1 CLJ 36; [1988] 1 CLJ (Rep) 265, *Pendakwa Raya v. Ishak Hj. Shaari (And 2 Other Appeals)* [2003] 3 CLJ 843 FC, *Tunde Apatira & Ors v. Pendakwa Raya* [2001] 1 CLJ 381 FC).

Accordingly, this court is satisfied that the prosecution had established a *prima facie* case that:

(1) the appellant was a public servant at the material time;

(2) he accepted the valuable thing being the cheque to the value of RM2,000 which was credited into his personal bank account and that he had accepted the said cheque to the value of RM2,000 for himself at the time the said cheque was credited into his account;

(3) he gave no consideration for the valuable thing he obtained;

(4) the contractor, (PW6) from whom the appellant had accepted the said cheque was known to the appellant to have had dealings or connection with the official function;

(5) therefore, the appellant was rightly ordered to enter his defence on the charge which he knew that he had received the said valuable thing for himself at the material time.

As to the defence this court finds, that infact the defence of the appellant and the submissions made at the close of the defence case and particularly the grounds raised in the petition of appeal glaringly shows that the appellant's complaints and defence was that the said cheque for the value of RM2,000 which the appellant had received from the contractor (PW6) was not for himself and instead the appellant was shifting the responsibility that it was used for the purchase of the computer and the computer was used by the department. In other words, the defence appears that the "cheque for the value

of RM2,000 was not used for himself but used to purchase a computer for the use of someone else, in the instant case, the staff of the mechanical department of Public Works Department." Infact, it is important to reiterate at this stage that the said cheque for the value of RM2,000 was made payable to the appellant and credited into the bank account of the appellant at Public Bank Jalan Pasir Putih which has been established by the prosecution and this has not been denied by the defence.

As to the above mentioned defence raised by the appellant that the sum of RM2,000 which was received from the contractor, (PW6) and credited into his bank account was used as part payment towards the purchase of the computer and that the balance sum of RM2,399 was paid by himself and that the computer was placed at the office of the mechanical department of the Public Works Department and used by all the staff is certainly not a defence to an offence under s. 165 of the Penal Code and rightfully has been rejected as having not raised a reasonable doubt on the prosecution case and even following the established proposition in law as in *Mat v. Public Prosecutor* [1963] 29 MLJ 263 and considering that motive for having accepted the said cheque of RM2,000 is immaterial to establish the offence under s. 165 of the Penal Code. Perhaps, this ground of defence may assist the appellant as conceded by the learned deputy public prosecutor as a strong mitigating factor in the assessment of the sentence by the court. It is important to reiterate at this stage that the offence under s. 165 of the Penal Code does not require taking of gratification as a motive or reward for any specific official action, favour or services but strikes at obtaining by a public servant of any valuable thing without consideration from any person whom he knows to have been having connection with the official function of himself. In other words, the money or cheque for the value of RM2,000 accepted by the appellant is a valuable thing and was accepted without consideration and in the circumstances as set out in s. 165 of the Penal Code. The question of motive or reward is wholly immaterial to establish the offence under s. 165 of the Penal Code although raised strenuously and repeatedly contended by the appellant's counsel.

Summons Or Arrest Case

As to the complaint raised on behalf of the appellant that the offence under s. 165 of the Penal Code was a summons case whereas the accused was arrested for an offence under the Anti Corruption Act 1997 but upon investigation was charged with the offence under s. 165 of the Penal Code which is a summons case but the case was registered as an arrest case and that the trial which was conducted as an arrest case was illegal and therefore he should be acquitted and discharged is misconceived and unsustainable in

law. Ordinarily, a person who commits an offence in respect of a summons case is arrested without a warrant but in the instant case, the accused was arrested with a warrant which later upon investigation was charged for a summons case. Nevertheless, even if the arrest is found to be unlawful and the charge against the offence under s. 165 of the Penal Code was registered as an arrest case, it is the respectful view of this court that the evidence obtained or received by the trial court is still admissible in law so long as it is relevant. (See *Karuma v. R* [1955] A.C. 197 and *R v. Sang* [1980] A.C. 402). At this stage, it is important to distinguish between the process carried out to compel the attendance of persons to the court and the trial procedure. In this jurisdiction concerning summary trials be it a summons case or an arrest case in the lower court, the reception of evidence is the same and both the Evidence Act 1950 and the Criminal Procedure Code applies to both summons and arrest case registered in the lower courts. However, the distinction between a summons case and an arrest case may be of relevance in India where the trial procedure prescribed for each is different. Hence, the distinction is important unlike in this jurisdiction where there are no equivalent provision to the Indian chapters XIX and XX of the Criminal Procedure Code 1973.

On the other hand, it is useful to stress at this stage, that even in the event the process to compel attendance of persons is not carried out correctly, it does not render the evidence received or admitted at the trial useless or vitiate the trial. It is just that the Criminal Procedure Code divides summons case and a warrant case into seizable and non-seizable offence but so far as the procedure of the trial is concerned there are no separate trial procedures and hence the evidence received in a arrest case which ought to have been received in a summons case is of no relevance so far as to admissibility of evidence. Therefore, this court is of the view that although the appellant ought to have been tried by summons case at the Sessions Court and not by an arrest case as registered in the instant case, the evidence remains admissible and it does not vitiate the trial proceedings and consequently, the conviction is not illegal or unconstitutional as contended by the learned defence counsel. (See *Public Prosecutor v. Liew Choo Kwong & Ors* [1962] 28 MLJ 382).

Lastly, on the totality of the evidence and considering the Grounds of Judgment of the learned Sessions Court Judge, it cannot be denied that the reasons given by the learned Sessions Court Judge for her conclusion is not so satisfactory and unclear but however this court is satisfied the appellant was rightfully found guilty on the evidence and there is no reason for this court to interfere and to reverse the finding of the learned Sessions Court Judge who found the appellant guilty of the offence under s. 165 of the Penal Code. Accordingly, the appeal against the finding of guilt by the learned Sessions Court Judge is

dismissed. However, as to whether the conviction ought to be sustained on the facts, the background, the circumstances and the extenuating circumstances under which the offence was committed, this court invited both parties to submit as to what should be the appropriate order on the sentence before deciding whether the conviction ought to be confirmed or set aside.

Facts Which Emerged During Trial And Which Are Relevant Can Be Considered In The Assessment Of Sentence

As to what should be the appropriate sentence in the instant case, it is important to consider the facts, the background, the extenuating or aggravating circumstances and other relevant consideration which would assist the court in deciding the appropriate sentence. In the instant case, the facts which emerged during the trial is a relevant consideration and ought to be considered by this court in assessing the appropriate sentence, namely, the evidence of Syed Abdullah bin Syed Abd. Rahman (PW4) who was the Ex-State mechanical engineer of the mechanical department of Public Works Department at the material time, the evidence of En. Ahmad Jalil Bin Jaafar (PW5), who was the mechanical engineer of Public Works Department and the head of department of the appellant at the material time and En. Ismail Bin Omar (PW6) the contractor and Managing Director of Huge Engineering who gave the said cheque for the value of RM2,000 and other related exhibits tendered by the prosecution and the defence. Infact the extenuating circumstances can be deduced from the evidence of the personalities as will be referred to below. (See *Tan Teck Seng @ Tan Chee Meng v. Public Prosecutor* [1990] 2 CLJ 103 and *Public Prosecutor v. Fam Kim Hock* [1957] 23 MLJ 20). The relevant piece of evidence of the personalities who have testified at the trial are:

Evidence of En. Syed Abdullah Bin Syed Abd. Rahman, the Ex-State Mechanical Engineer of PWD, Perak, Ipoh (PW4) is as follows:

> Baucer-baucer bayaran dikeluarkan selepas pengesahan kerja di eks. P10 dikeluarkan. Pengesahan dibuat oleh En. Remely (tertuduh) dituruti En. Jalil (PW5) dan kemudian saya (PW4). Mana-mana pegawai atau Kakitangan Cawangan Kejuruteraan Mekanikal tidak boleh memohon apa-apa bantuan atau sumbangan dari mana-mana pihak. Dan ini tidak dibenarkan untuk tujuan peribadi.

However, it is important to appreciate the following part of PW4's evidence where he has stated:

> untuk jabatan ia dibolehkan tetapi ada syaratnya iaitu jabatan dibenarkan meminta bantuan melalui proses yang dibenarkan. Jabatan boleh memohon melalui dan dengan kebenaran MAKSAK. Permohonan hendaklah dibuat oleh pejabat dan bukan oleh individu. Permohonan dibuat secara rasmi melalui surat.

Under cross-examination PW4 has further testified:

> pihak individu atau jabatan tidak boleh menerima hadiah atau sumbangan kecuali mengikut peraturan-peraturan yang ditetapkan setelah mendapat kelulusan. Jika ada hadiah yang hendak ditawarkan, kita boleh memberitahu Ketua Jabatan di mana beliau akan mengambil tindakan yang selanjutnya. Saya rasa ini terkandung dalam Bab D General Order. Jika seseorang hadiahkan sesuatu kepada Jabatan, saya tidak pasti peraturan sama ada perlu lapor dulu sebelum terima hadiah atau boleh terima hadiah dan kemudiannya membuat laporan. Semasa komputer itu diberi, saya tidak diberitahu tentangnya. Pada waktu yang agak lewat, saya diberitahu ada satu komputer di Bahagian Perkhidmatan Mekanikal Dalam Bangunan (PMDB) dan digunakan di situ oleh kakitangan di situ. Pegawai yang bertanggungjawab di PMDB ialah Jurutera Ahmad Jalil. Sepatutnya dia melaporkan kepada saya jika ada apa-apa cadangan tentang hadiah. Beliau tidak melaporkan tentang hadiah komputer ini kepada saya. Orang yang bertanggungjawab untuk melaporkan tentang hadiah ini En. Ahmad Jalil, sebagai Ketua Bahagian. Jika En. Ahmad Jalil yang pergi membeli sendiri komputer, maka ketua kumpulan yang lebih bertanggungjawab.
>
> Pemeriksaan Semula:
>
> Saya tidak tahu tentang adanya komputer yang hendak diberi oleh pihak kontraktor ke Jabatan. Saya hanya diberitahu kemudian. Saya tidak pasti jarak masanya. Saya tidak pasti samada ada orang beri komputer ini. Saya tidak tahu siapa yang memberikan komputer dan bila ianya diberikan.
>
> Saya juga tidak tahu kepada siapa komputer tersebut diserahkan kerana tiada laporan atau permohonan yang sampai kepada saya sebagai Ketua Jabatan. Saya mungkin pernah tengok sekali komputer tersebut. Saya boleh cam komputer jabatan tetapi saya tidak boleh cam komputer yang dihadiahkan.

The relevant piece evidence of En. Ahmad Jalil Bin Jaafar (PW5), the mechanical engineer of PWD Perak Ipoh is as follows:

> Dalam bulan Februari 2002, saya dan OKT ada pergi ke I.T. Castle where it was situated in Greentown Business Centre. Saya ke sana untuk tengok OKT membeli komputer lap top. Komputer ini dibawa balik ke pejabat JKR Mekanikal Perak. Komputer ini disimpan di bahagian saya, di luar bilik saya. Ia digunakan oleh semua kakitangan. Komputer tersebut dibeli untuk kegunaan pejabat. Komputer tersebut telah dirampas oleh pihak BPR. Saya tidak diberitahu oleh OKT siapa yang membiayai perbelanjaan komputer ini. Saya mengikut beliau kerana beliau yang mengajak saya. Beliau tidak beritahu saya siapa yang menghadiahkan komputer tersebut. Saya tidak pernah bertanya siapa yang hadiahkan komputer tersebut dan OKT tidak pernah memaklumkan kepada saya. Saya juga tidak diberitahu atas tujuan apa pembelian komputer tersebut.

The evidence of PW5 in so far as to the fact that he went with the appellant to the computer shop in February 2002 and the fact that the computer was brought to the PWD's office of the mechanical section, the fact that it was placed outside PW5's office and the fact that it was used by all the staff and that the computer was purchased for the use of the office is a very crucial piece of evidence to show that the appellant was transparent when he accepted the cheque for the sum of RM2,000 which subsequently was used for the purchase of the computer and this is not denied by the prosecution. Infact the Anti Corruption Agency had taken away the computer from the office of PWD. In view of this crucial fact, it is most unjustified for the appellant to be made a 'scapegoat' for the transaction notwithstanding that the said cheque for the value of RM2,000 was paid into the personal bank account of the appellant although there is evidence to show that initially the appellant had asked for a sum of RM10,000 and eventually it resulted in the acceptance of the gift being the cheque for the value of RM2,000.

The evidence of En. Ismail Bin Omar (PW6) the former engineer of PWD and later became the contractor and Managing Director of Huge Engineering who had donated the said cheque for the value of RM2,000 for the purchase of the computer for the office use is also crucial and can also be applied and considered as a determining factor in the assessment of sentence. The evidence of PW6 has disclosed and the preliminaries shows that the purchase of the computer was for the mechanical engineering department of the computer section where PW6 has further testified as follows:

> Sepanjang saya berurusan dengan JKR, JKR Ibu Pejabat Kuala Lumpur pernah minta sumbangan dari syarikat saya, iaitu sumbangan untuk mesyuarat pegawai-pegawai atasan. Surat meminta sumbangan ada difaxkan kepada syarikat saya mohon sumbangan bagi aktiviti mereka. Ibu Pejabat JKR juga ada meminta sumbangan untuk mesyuarat pegawai-pegawai atasan, bentuk sumbangan tidak dinyatakan. Semasa saya berada di pejabat OKT, OKT ada tunjukkan computer print out, saya tidak ingat sama ada dia ada nyatakan komputer untuk kegunaan pejabat atau tidak, tetapi komputer ada di pejabat dan dia katakan dia perlu wang untuk bayar komputer tersebut. Saya tidak bertanya ia untuk kegunaan siapa tetapi saya beranggapan ia adalah untuk kegunaan JKR Mekanikal dan ini saya sendiri yang memutuskan untuk menyumbang RM2,000 untuk urusan pembelian komputer. Dia minta pembayaran untuk komputer dan pembayaran dibuat melalui akaun beliau. OKT yang menyuruh saya masukkan wang ke dalam akaun beliau. Atas kemampuan syarikat, saya bayar RM2,000 untuk pembelian komputer. Saya ada katakan wang RM2,000 adalah pembayaran untuk komputer kepada BPR semasa saya disoal siasat" dan this part of the evidence is confirmed by En. Aziz Bin Che Mood (PW7) the Investigating Officer of the Anti Corruption Agency Perak where he has stated that "Saya setuju bahawa dalam percakapan SP6 ada katakan bahawa dia beri RM2,000 untuk membeli komputer. Komputer

adalah untuk kegunaan OKT kerana dia berada di Pejabat OKT. Sekarang komputer tersebut telah dirampas dan berada di pejabat BPR. Saya tidak siasat fakta bahawa komputer tersebut digunakan oleh En. Jalil sejak dari dibeli sehingga dirampas.

There is also the defence story which is consistent with the evidence of the prosecution witnesses and the documentary evidence. In his defence, the appellant has testified that the said sum of RM2,000 was used to pay for the computer which cost RM4,399 and that the balance of the purchase price being RM2,399 was paid from his own money. He further testified that the computer was brought back and kept in the room of En. Jalil (PW5) and that the computer was used by En. Jalil. In re-examination, the appellant has further testified that the contribution that he sought from En. Ismail (PW6) was for the purchase of the computer and it was for use of the department. There is also confirmation from En. Leong Choo Mee (DW2), the sales executive of I.T. Castle Greentown Ipoh who has testified that the cost of the computer was RM4,399 and this is confirmed by the receipt (exh. D13) and the payment voucher (exh. P6) dated 5 February 2002 from Huge Engineering, Ipoh whose Managing Director was PW 6 where it is stated that the amount of RM2,000 to be paid was for JKR mechanical – computer.

In the circumstances, this court is of the view that this court is entitled to take notice of all this material piece of evidence adduced at the trial in its totality in considering the appropriate sentence.

Sentence

As to the question of sentence, the heart of the difficulty lies in the balancing of interests which by no means always coincide, the interest of the public, on one hand and the accused on the other. No two cases, even one of the same type, are alike. First, the outrage of the community at large in the abuse of their position by the public servants who have dealings with contractors and other business personalities, secondly, where the court believes that the accused is not a criminal as such, in some cases but an employee or a subordinate is made use by the head of the department to solicit for donations either for the benefit of the head of the department or for the department as a whole and when the trusted employee is arrested, the head of department claims ignorance of the whole transaction and as a result the helpless employee becomes a victim and is made a scapegoat and left to face the charge and the trial. Thirdly, the need to deter others from similar practices. It cannot be denied that in some cases, some trusted employees take advantage, indeed of the very quality of confidence placed in them by their employers or superiors. The greed of demanding or expecting or hoping to receive money, gifts or obtaining a gratification from members of the public should not be seen as a fashion or

custom and should never occur in the minds of public servants, to such an extent that they easily succumb to such temptations and for monetary motives as this will bring disrepute to the administration and the government service and can be disastrous. Public interests demand that public servants should discharge their public duty with high integrity and impartiality without any fear or favour. Basically it is to purify public administration in the discharge of their public duty without any expectation or hope of receiving gifts under any circumstances so that there will be no room for discrimination when dealing with matters which concerns members of the public.

On the facts, the background, the circumstances of the case and considering the evidence of the former mechanical engineer of JKR, Ipoh (PW4), the evidence of the mechanical engineer of JKR (PW5) who accompanied the appellant in respect of the purchase of the computer where the sum of RM2,000 was received and subsequently used to pay towards the account of purchase of the computer and the evidence of the former mechanical engineer of JKR (PW6) who later become the contractor where he obtained contracts from JKR and the defence story, there appears to be a breach of some departmental regulations which was not followed correctly or adhered to by the appellant. To put it in a nutshell, this is a clear case and not denied by the evidence adduced on behalf of the prosecution that the sum of RM2,000 received from the contractor (PW6) was paid towards purchase of the computer and the computer was infact placed in the office of the JKR mechanical Engineering Department for the use of the staff and the balance of the purchase price for the computer being RM2,399 was paid by the appellant's own money. This court finds that where the balancing of the offence with the offender is considered on the facts and circumstances, in the instant case, it tilt in favour of the appellant that he be treated leniently on the exceptional and extenuating circumstances under which the offence was committed.

A custodial sentence may in some cases be required by the very essence of justice to be done, on the other hand each case must be decided on its own set of facts, circumstances and extenuating circumstances under which the offence was committed and the background of the offender. All these factors which might tilt in favour of an accused person cannot be brushed aside or disregarded but must be balanced equally along with the set of facts presented by the prosecution in order to secure an attainable justice. It has been stated time and time again that each individual case must be considered by its merits and be examined with a view to ascertaining whether, having regard to any of the matters mentioned in s. 173A of the Criminal Procedure Code binding over an offender without recording a conviction is in all the circumstances of

the particular case is expedient (see *Public Prosecutor v. Lim Guan Hock* [1949] 15 MLJ 231, *Public Prosecutor v. Idris* [1955] 21 MLJ 234, *Public Prosecutor v. Yeong Yin Choy* [1976] 2 MLJ 267, *Re Badri Bin Abas* [1971] 1 MLJ 202, *Varatharajalu v. Public Prosecutor* [1960] 26 MLJ 158, *Public Prosecutor v. Tan Eng Hock* [1970] 2 MLJ 15).

Section 173A of the Criminal Procedure Code states:

> Power to discharge conditionally or unconditionally
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> (1) Notwithstanding anything contained in s. 173, the court shall have the powers contained in this section.
>
> (2) When any person is charged before the court with an offence punishable by such court, and the court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, the court may, without proceeding to record a conviction, make an order either:
>
> (a) dismissing the charge or complaint after an admonition or a caution to the offender as the court seems fit; or
>
> (b) discharge the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order.

On the other hand, s. 173A of the Criminal Procedure Code may not apply where the offence committed is of a serious nature and committed deliberately and there are aggravating circumstances for the court to take a serious view of the offence and which must be reflected in the sentence (See *Public Prosecutor v. Mohamad Ramly* [1974] 1 MLJ 95, *Public Prosecutor v. Tan Eng Hock* [1970] 2 MLJ 15, *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256, *Public Prosecutor v. Tengku Mahmood Iskandar* [1973] 1 MLJ 128).

This court also finds that conditions set out under s. 294A of the Criminal Procedure Code are not applicable to a bond where s. 173A of the Criminal Procedure Code is invoked as the said order has no punitive effect in as much as it nearly and enjoins the offender to conduct himself as any other law

abiding citizen. (See *Public Prosecutor v. Onn* [1969] 1 MLJ 4, *Halsbury's Laws Of Malaysia* vol. 18 Criminal Procedure, *Chow Kim Lan v. Public Prosecutor* [1966] 1 MLJ 183).

This court has also considered the fact that the appellant had pleaded not guilty and contested the charge but however, this court is of the view that it does not debar this court from invoking s. 173A of the Criminal Procedure Code if there are extenuating circumstances under which the offence was committed and the peculiar set of facts to the offender warrants it. The application of s. 173A of the Criminal Procedure Code need not necessarily be invoked only to offenders who had pleaded guilty at the beginning of the trial and the court still has the discretion to consider on the set of facts and circumstances in each individual case especially if there are extenuating circumstances under which the offence was committed. (See Perak Criminal Trial No: 45-10-90 *Public Prosecutor v. Jafri Bin Mohamed Tahir* decided on 5 August 1998 (unreported)). In the instant case, the learned Sessions Court Judge had failed to consider adequately the reformative factor and has placed too much emphasis on the deterrent factor by expressly stating that the offence is rampant. Infact, it is most unfair to make a general statement that this offence is rampant or prevalent as there was no statistics available or produced before the court and the bare statement would give the impression that it is rampant in all government departments and the court must be cautious in making such bare statement so as not to demoralize those innocent public servants who are clean in their duties and loyal to the government.

As for the appellant who is 47 years of age, it was submitted that he is married, has a wife and children and that he had served the government of Malaysia for the past 24 years. Further, it is also submitted that the appellant's intention to accept the sum of RM2,000 was made clear when he had been to I.T. Castle Sdn. Bhd. Greentown Ipoh with his head of department (PW5) and where he had used the said sum of RM2,000 towards part payment of the computer and that the balance of RM2,399 was paid out of his own pocket and that the computer was placed in the office for the staff and which was within the knowledge of the head of department (PW5) who had admitted that he had seen the computer in the office. This is a very sad state of affairs where and if there was any breach of formalities in obtaining donations and had the head of department corrected the procedure in having obtained the said sum of RM2,000 towards part payment of the computer, perhaps, it would have circumvent the criminal charge against the appellant. Unfortunately, there was clear lack of supervision and responsibility on the part of the head of department who cannot on the facts in the instant case, disclaim knowledge or liability.

Cross-Appeal By Deputy Public Prosecutor On Sentence

In submitting for the sentence to be enhanced, the learned deputy public prosecutor submitted as follows:

> That the focus of the learned trial judge in respect of the sentence was the extenuating circumstances of the appellant and his family with little emphasis on the public interest element and deterrence of other public functionaries that are similarly placed. The fact that the appellant was suspended from his job since, should not be a paramount consideration. A deterrent sentence should be imposed for to an extent, the appellant has abused his position in the manner he had conducted this offence. The appellant would not have had the audacity to make such a request from SP6, had it not been for the position that he had held. In that respect, it is the respondent's contention that there was an abuse of position on the part of the appellant and the sentence should reflect this. The fact that the appellant is a first offender should not influence the court. The learned Deputy Public Prosecutor has also raised other factors to enhance the sentence in his written submissions. The learned Deputy Public Prosecutor has also relied on the following cases:
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> (1) *Pendakwa Raya v. Chan Akau* [2000] 4 MLJ 471
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> (2) *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186
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> (3) *Public Prosecutor v. Perumal Suppiah* [2000] 3 S.L.R. 308
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> (4) *Public Prosecutor v. Vijaya Raj* [1981] 1 MLJ 43
>
> (5) *Lim Poh Tee v. Public Prosecutor* [2001] 1 S.L.R. 674
>
> (6) *Re Eng Chong Lam* [1964] 30 MLJ 10
>
> (7) *Ahmad Bin Haji Bakar v. Public Prosecutor* [1988] 2 MLJ 216
>
> (8) *R. v. Sargeant* [1974] 60 Cr. App R 74

No Conviction If Section 173A Of The Criminal Procedure Code Is Invoked

In the instant case, this court in its appellate capacity had only confirmed the finding of guilty of the appellant by the learned Sessions Court Judge and is yet to decide on the conviction. The learned Deputy Public Prosecutor has submitted that the application of s. 173A of the Criminal Procedure Code as a possibility of an alternative mode of punishment against the appellant as indicated by this court cannot be invoked after a conviction is recorded and referred to the case of *Public Prosecutor v. Tan Eng Hock* [1970] 2 MLJ 15. In opposing the order under s. 173A of the Criminal Procedure Code, the learned Deputy Public Prosecutor relied on the following cases:

(1) *Re Badri Bin Abas* [1971] 1 MLJ 202

(2) *Public Prosecutor v. Yeong Yin Choy* [1976] 2 MLJ 267

(3) *Public Prosecutor v. Idris* [1955] 21 MLJ 234

(4) *Public Prosecutor v. Ismail Bin Loyok* [1958] 24 MLJ 223

(5) *Tan Teck Yam v. Public Prosecutor* [1968] 1 MLJ 57

Infact, this court had made it clear that it will decide on the conviction after hearing submissions from both parties and that was the reason why this court had only confirmed the finding of guilty of the appellant by the learned Sessions Court Judge and did not decide on the conviction as yet. Therefore, the submission by the learned Deputy Public Prosecutor that s. 173A of the Criminal Procedure Code cannot be invoked, with respect, is premature as this court had not decided on the conviction as yet. Nevertheless, if this court were to invoke s. 173A of the Criminal Procedure Code in favour of the appellant, it is obvious that the conviction cannot be sustained or recorded as the statutory provision in s. 173A(2) of the Criminal Procedure Code has expressly made it clear that a conviction cannot be recorded where the court may wish to make an order either under (a) or (b) of sub-s. 2 of s. 173A of the Criminal Procedure Code.

On the other hand, learned counsel for the appellant has urged upon this court and has submitted that the proper order on the set of facts and circumstances in the instant case is to bind over the appellant under s. 173A of the Criminal Procedure Code.

On a proper balance of all the relevant circumstances, the punishment which would meet justice of the case in the instant case, is to release the appellant on a bond under s. 173A of the Criminal Procedure Code. The appellant is not by nature a criminal but rather a weak willed person and considering that he has paid more towards the purchase of the computer than what he had received. On the other hand, it cannot be disregarded that it is for the appellant to weigh the likely consequences of his acts before he indulges in those activities which may tarnish the operation of the PWD.

This court finds that if ever there was a case which deserved leniency and to temper justice with mercy by invoking s. 173A of the Criminal Procedure Code this was such a case bearing in mind that the exercise of mercy must be tempered with well-balanced judgment. Infact, this is one of those cases where the head of department had lacked in his responsibilities and supervision

and perhaps encouraged the commission of accepting gifts or money which in the instant case, was eventually used to purchase the computer for the use of the office. The head of department cannot be seen to be pretending or be blind and at the same time enjoying the fruit of his irresponsibilities and the appellant is made to pay for the boss's lack of responsibilities and is made a scapegoat to face the charge and trial against him. In order to ensure that every public servant is clean and honest and be free of any corrupt activities and does not breach the Service Circular Reference No: 3 of 1998, the superior themselves or the head of department must himself or herself be seen to be clean and honest and strictly comply with all the obligations under the Service Circular Reference No: 3 of 1998 and such other directions given from time to time otherwise there could be room for allegation of discrimination. Infact, prevention of such commission of offences or activities is better served rather than taking steps to cure it when it has reached a stage where it becomes irreversible.

In *Public Prosecutor v. Idris* [1955] 21 MLJ 234 at p. 235, Thomson J. said:

> Section 173A is applicable in all cases triable in the Magistrate's Court irrespective of the nature of the prescribed punishment and it is to be observed that where it is proposed to exercise the powers given by it, the Court should not proceed to conviction.

In *Public Prosecutor v. Ismail Bin Loyok* [1958] 24 MLJ 223 at p. 224, His Lordship Smith J. said:

> From the learned President's reasons for imposing this sentence he appears to have taken a relatively lenient view because although the accused was doing the work of a supervisor he was in fact no more than a timescale clerk, and the supervision of the Department by senior officers being extremely lax the accused succumbed to the temptation placed before him. In the words of the learned President "The accused was a first offender who, as a result of a weakness in his character, has betrayed the trust which had been reposed in him. In the circumstances I think he should be given another chance to behave.
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> In my opinion the learned President has in this case not given sufficient consideration to the public interest. The principles upon which the Courts in this country act are those set out in *R v. Ball.* The first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to punish the offender but also to deter others. Although it is desirable that the first offender should if possible be kept from coming into contact with hardened criminals, nevertheless other public servants submitted to temptations will not be deterred from succumbing to temptation if they see that the only punishment which it involves is some form of binding-over. Until it is understood by all public servants in this country that the normal punishment for helping themselves to public money is to be sent to prison they will continue to be weak-willed persons prepared to pilfer the till.

In *Shanmuganathan v. Public Prosecutor* [1967] 1 MLJ 204, His Lordship Azmi C.J. (Malaya) said:

> The appellant was convicted of having committed criminal breach of trust of RM150 cash whilst in the employment of Borneo Motors (M) Ltd. Kuala Lumpur, an offence punishable under s. 408 of the Penal Code and was sentenced by the president of the sessions court to four month's imprisonment.
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> Originally he appealed against both conviction and sentence but ultimately he withdrew the appeal against conviction and asked me to consider only the question of sentence.
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> In view of the above circumstances, particularly the age of the appellant and his clean record, I feel that the sentence of imprisonment would not be an appropriate one. I therefore order that the appellant be released on his signing a bond under section 173A of the Criminal Procedure Code to be of good behaviour for a period of one year with one surety in the sum of RM1,000.

In *Balakrishnan v. Public Prosecutor* [1969] 2 MLJ 61 at p. 62, His Lordship Abdul Aziz J. said:

> I know that corruption is a serious offence, but exceptional circumstances – as in this case – would mitigate the severity of the sentence imposed by law.

In *Re Badri Abas* [1971] 1 MLJ 202, His Lordship Sharma J. said:

> The object of punishment as has been so often said, is two-fold, first the prevention of offences and secondly the reformation of the offender. Punishment would become a greater evil if, instead of reforming the offender, it is likely to harden him by repeating the crime and thus causing possibly an irreparable injury not only to himself but also tending to defeat the object of punishment. Section 173A, I think, is primarily aimed at dealing leniently with first offenders who are not guilty of offences which are not so serious by giving such persons a chance of reformation which they would lose if they were sent to prison. A person convicted of an offence cannot, however, as of right claim the benefit of s. 173A. The exercise of the power is entirely in the discretion of the court and can only be exercised according to the circumstances of each case. The legislature has very clearly enumerated that the age, character, antecedents of the offender, the circumstances in which the offence was committed, the physical or mental condition of the offender, the trivial nature of the offence if it be so, or other extenuating circumstances under which the offence was committed should be taken into consideration while exercising the discretion under this section. An exercise of discretion under this section requires a considerable sense of responsibility and courts should not allow themselves to be misled into applying this section by any misplaced sense of leniency or sympathy. The public must not be led to suppose that any offender may commit any crime without any fear of punishment. If there are circumstances which indicate that the accused had succumbed to a sudden temptation, or the offence committed by him was

committed only as a result of sudden uncontrollable impulse, or it was the result of sheer thoughtlessness, it may afford some reason to exercise discretion under s. 173A. These are quite a few of the considerations which may be taken into account. The list can never be exhaustive. There may be numerable situations and circumstances depending on the facts of a particular case and it is upon those circumstances that the court should exercise its proper judgment.

I am of the view that action cannot be taken under s. 173A on the ground of the age of the offender alone unless there is placed on the record material to show that by reason of the character, antecedents and the circumstances under which the accused committed the offence, it was expedient to act under that section. There is no such record in this particular case and the age of the accused is also not one where the court could be favourably inclined to exercise its discretion either under s. 173A or s. 294 of the Criminal Procedure Code, as he is 36 years of age. A person may be led astray or inadvertently act under an evil influence. That may be a case in which the powers under s. 173A of the Criminal Procedure Code may be invoked. There is nothing of that sort in this case. From a plain reading of s. 173A of the Criminal Procedure Code I find that the intention of the legislature in inserting that provision was to indicate the lines on which the discretion of the court should be exercised. It was not meant, in my view, to be applied indiscriminately to all first offenders.

In *Public Prosecutor v. Mohamad Ramly* [1974] 1 MLJ 95 at p. 96, His Lordship Mohamed Azmi J. said:

The main question to be determined in this appeal is whether the present case falls squarely and fairly within the terms of s. 173A(ii)(b) of the Criminal Procedure Code. In my view, the learned magistrate failed to consider sufficiently the serious nature of the offence committed and the deliberate manner in which the crime had been perpetrated. Where the offence committed is not of a trivial nature and it is committed with such degree of deliberateness, a case can rarely come within the ambit of this section. In assessing sentence, a proper balance should be struck between public interest and the interest of the accused. In the present case, it is apparent from the grounds of judgment that the learned magistrate was too preoccupied with the interest of the accused whilst giving no adequate consideration to public interest. The object of punishment is not only to punish the offender but also to deter others. Forging a Malaysia Certificate of Education and using such forged document as genuine should not be considered lightly and the public interest would not be served by discharging the offender conditionally on his entering into a bond of good behaviour with or without sureties.

The order under s. 173A of the Criminal Procedure Code is set aside on both counts.

In *Chan Sit Hoong v. Public Prosecutor* [1975] 1 MLJ 261 at p. 262, His Lordship Ajaib Singh J. said:

> The general principles on which sentences should be imposed were laid down by Hilbery J. in *R. v. Ball*, an authority which is often cited with approval in our courts, as follows:
>
> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe. It is for these reasons, and with these purposes in view, that before passing sentence the court hears evidence of the antecedents and character of every convicted person. It follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two to be lenient to the one and not to the other. The background, antecedents and character of the one and his whole bearing in court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career. The argument that a severe sentence on one prisoner must be unjust because his fellow prisoner, who was convicted of the same crime, received a light sentence or none at all, has neither validity nor force. The differentiation in treatment is justified if the court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences.
>
> This was his first offence. Sending him to prison where he would have mixed with other prisoners convicted of all sorts of offences might well have produced an adverse effect on the appellant and instead of coming out of the prison a better man he might well have developed more criminal and anti-social tendencies. The public interest, as Hilbery J. said in the case of *R. v. Ball, supra*, may best be served if the offender is turned from his criminal ways to honest living. Treating the appellant leniently in the circumstances of this case and thus giving him a chance to turn away from crime was certainly not against but very much in the public interest.

The learned president, while failing to give adequate consideration to the fact that the appellant was a first offender and that he had a sizeable family to support, was unduly influenced by what he described as the prevalence of the offence, of which he had no statistics in support, and by the quantity of the opium which, again, was not that large as to increase the gravity of the offence and thereby justifying the imposition of a stiff sentence. In the circumstances, therefore, I decided to alter the sentence of imprisonment to a fine. I accordingly allowed the appeal, set aside the sentence of one year's imprisonment and substituted a fine of RM2,000 in default three months' imprisonment.

I trust that it may not be out of place here to quote some observations made by Professor T. T. B. Koh in a short but stimulating speech on a plea for penal reform which he delivered to the Kiwanis Club Singapore on 18th April, 1972, and which is reproduced in [1972] 1 M.L.J. lvii. On the question of sentences imposed by the courts Professor Koh had this to say:

> In 1970, the courts exercising criminal jurisdiction in Singapore convicted 3,734 adult offenders of sizeable offences. Of this number, 92.2% were fined, 4.7% were sent to prison, 2.7% were bound over or placed on probation and 0.4% were sent to Reformative Training Centre. It will be immediately apparent that the percentage of convicted adult offenders who were sent to prison, ie, 4.7% was relatively small. This is as it should be because sending a man to prison should be regarded as a last resort. I take this view for the following reasons. When a convicted man is sent to prison, he is branded with a social stigma which he carries for the rest of his life. There are unfortunately very few employers in Singapore who are enlightened enough to give discharged prisoners a fair opportunity of employment. The failure by the discharged prisoner to obtain employment and the hostility he confronts from society, very often leads him to feel alienated from society. In extreme cases, it could even lead a man to reject himself. When this happens, the chances of his rehabilitation are greatly reduced for a man must have respect for himself if he is to be successfully resocialized. Another objection to sending offenders to prison is that it disrupts their family life, their social relations and their employment. Another and perhaps graver objection is that most penal institutions have what is called an inmate sub-culture and the experience of imprisonment may, therefore, be corrupting to the offender who is in prison for the first time, rather than a means of his resocialization.

... I wish to argue in favour of the view that our courts should only send to prison a convicted man who has committed a grave crime against society and who has failed to respond to other non-custodial penal measures. In the case of a man convicted of offences which have not caused grave injury to person or damage to property, and who has not previously been sentenced to non-custodial

penal measures, a sentence of imprisonment should never be imposed by the courts.

In *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 258, His Lordship Hashim Yeop A. Sani J. (as he then was) said:

The types of cases and the set of circumstances where section 173A of the Criminal Procedure Code can appropriately be applied are by no means exhaustive.

In *Public Prosecutor v. Yeong Yin Choy* [1976] 2 MLJ 267, Abdoolcader J (as His Lordship then was) observed:

I would think that the essential difference in the application of the provisions of ss. 294 and 173A of the Code is that the latter is normally intended to be utilized in cases of minore import and calling for exceptionally mild treatment affecting adult and youthful offenders alike where the nature of the offence, the extenuating circumstances of the case and the factors peculiar to the offender in question justify and perhaps even require that no conviction be recorded against him, so that although he is either admonished or cautioned or discharged conditionally as provided therein there remains no blemish or stain against him by reason of a conviction being recorded.

The provision of s. 173A of the code was considered in the case of *PP v. Yong Thiam Fatt* [1980] 2 MLJ 145 where the court held that the Magistrate in the exercise of his judicial discretion has the power to make an order under s. 173A of the code for the contravention of s. 74 of the Road Traffic Ordinance. In *PP v. Mohammad Ramly* [1974] 1 MLJ 95 it was stated that:

Where the offence committed is not of a trivial nature and it is committed with such degree of deliberateness, a case can rarely come within the ambit of this section. In assessing sentence, a proper balance should be struck between public interest and the interest of the accused. In the present case, it is apparent from the grounds of judgment that the learned Magistrate was too preoccupied with the interest of the accused whilst giving no adequate consideration to public interest. The object of punishment is not only to punish the offender but also to deter others. Forging a Malaysia Certificate of Education and using such forged document as genuine should not be considered lightly and the public interest would not be served by discharging the offender conditionally on his entering into a bond of good behaviour with or without sureties.

In *Varatharajalu v. PP* [1960] MLJ 158 Hepworth J was of the view that a binding over under 173A cannot be ordered after conviction has been recorded.

In *Public Prosecutor v. Yong Thiam Fatt* [1980] 2 MLJ 145 at p. 146, His Lordship Harun J. said:

> I would accordingly hold that:
>
> (i) The Magistrate in the exercise of judicial discretion has the power to makean order under s. 173A Criminal Procedure Code for a contravention of s. 74 of the Road Traffic Ordinance; and

In *Public Prosecutor v. Jafa Bin Daud* [1981] 1 MLJ 315 at p. 316, His Lordship Mohamed Azmi J. said:

> Section 173(m)(2) of the Criminal Procedure Code provides:
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> If the court finds the accused guilty or if a plea of guilty has been recorded and accepted the court shall pass sentence according to law.
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> A "sentence according to law" means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender.

In *Taib Bin Gemok v. Public Prosecutor* [1984] 1 MLJ 313 at p. 315, His Lordship Rhind J. said:

> The modern tendency in sentencing, as I understand it, is not to try to fill the jails at every conceivable opportunity, but only to send people to prison where this is essential in the interest of society. I certainly do not regard it as in the interest of society to send people of previously good character, particularly young people, to prison when there are other adequate means of dealing with them.
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> In the case before me, I consider that a sentence of imprisonment was wholly wrong in principle. The appellant is a very young man of good character, and the facts of the offence disclosed no circumstances of aggravation. I am aware that the appellant was a policeman, but it has to be borne in mind that he was a very young and inexperienced policeman, and this offence was in no way connected with his duties. I do not see how it would serve the public interest to send this particular appellant to prison.

In *Tan Tek Seng @ Tan Chee Meng v. Public Prosecutor* [1990] 2 CLJ 103 at p. 105, His Lordship Richard Tallala JC (as he then was) said:

> ... I should say the offences were committed under extenuating circumstances. It is a borderline case, one suitable for exercise of the power given under s. 173A of the Criminal Procedure Code. Accordingly pursuant thereto I set aside the conviction and sentence imposed by the learned Sessions Court Judge and

a discharge the appellant conditionally upon his entering into a bond of RM5,000 without sureties to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during a period of 3 years from this date.

I should add that the provisions of s. 173A have been applied after much thought b and a consideration of the special circumstances of this case. In this regard I have in mind all that was said by the learned judge in *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256.

In *Tia Ah Leng v. PP* [2004] 4 CLJ 77 at p. 85, His Lordship Mokhtar Sidin JCA said:

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> In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the courts ….. should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

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There is room for the court to exercise mercy and leniency, even for offenders with bad records when the court forms the view that leniency at that stage of the offender's life might lead to reform. (See *R v. Osenkowski* [1982] 30 SASR 212; 5 A Crim R 394).

e In *R v. Kane* [1974] VR 759, Gowans J. said:

> Justice and humanity walk together. Cases frequently occur where a court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts. But mercy must be exercised upon considerations which are supported by the f evidence and which make an appeal not only to sympathy but also to well-balanced judgment. If a court permits sympathy to preclude it from attaching weight to the other recognised elements of punishment, it has failed to discharge its duty.

In *R v. Osenkowski* [1982] 30 SASR 212; 5 A Crim R 394, King CJ g observed:

> It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which h has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.

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In *Tilley* [1991] 53 A Crim R 1, Thomas J. said:

> It is common that hardship or stress is shared by the family of an offender but that may be an inevitable consequence if the offender is to be adequately punished. An offender cannot shield himself under the hardship he or she creates for others, and courts must not shirk their duty by giving undue weight to personal or sentimental factors. The public, which includes many people who struggle to bring up their children with moral standards, would be poorly served if the courts gave in to the temptation.

This court has considered the judicial principles on appeals against sentence which are settled and the circumstances when the appellate court may intervene and disturb the discretion exercised by the court. If a sentence is excessive or inadequate to such an extent as to satisfy an appellate court that when it was passed there was a failure to apply the right principles, then intervention by the court is justified. (See *Abu Bakar Bin Alif v. R* [1953] 19 MLJ 19, *Rex v. Leo De Cruz* [1935] MLJ 1 and *Public Prosecutor v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370 HC).

In *Rex v. Teo Cheng Lian* [1949] 15 MLJ 170 at p. 171, Gordon-Smith J. said:

> There must be a manifest error, either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances, before the higher court interferes with the discretion undoubtedly vested in the lower court.

By making an order and without recording a conviction to discharge the appellant conditionally on his entering a bond with one surety to be of good behaviour pursuant to s. 173A of the Criminal Procedure Code, it is the better interest of the public to invoke the provision of s. 173A in favour of the accused. Having regard to the age, the extenuating circumstances in which the offence was committed, the nature of the offence which on the facts shows a borderline situation between an offence under s. 165 of the Penal Code and a breach of the departmental regulation (See Pekeliling Perkhidmatan Bilangan 3 Tahun 1998 in respect of giving and receiving gifts by public servants) and to the extenuating circumstances under which the offence was committed and the fact that the appellant had not gained or benefited from the sum of RM2,000 but rather he had to incur a loss in the sum of RM2,399 from his own income which was not denied by the prosecution and that the computer was infact placed in the office of JKR for the use of the office staff and that it was taken away by the Anti Corruption Agency from the office of JKR, - it is expedient and justified to release the appellant on probation pursuant to s. 173A of the Criminal Procedure Code.

Accordingly, this court orders that the conviction be set aside and the fine if paid to be refunded and instead discharge the appellant by ordering him to enter into a bond under s. 173A of the Criminal Procedure Code with one surety in the sum of RM3,000 to be of good behaviour for a period of two years from today. In the circumstances, the appeal against the finding of guilty is dismissed, the conviction and sentence is set aside and the fine paid to be refunded to the appellant and the appellant is discharged by directing him to enter into a good behaviour bond with one surety in the sum of RM3,000 for a period of two years from 7 October 2005. The cross-appeal by the learned Deputy Public Prosecutor is dismissed.